

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIMO HOSTING, et al.,)	
)	
Plaintiffs,)	No. C 08-2474 BZ
)	
v.)	ORDER PARTLY GRANTING
)	DEFENDANT'S MOTION FOR
MIKHAIL FIKS, et al.,)	ATTORNEYS' FEES
)	
Defendants.)	
_____)	

Following a jury verdict against Limo Hosting, Inc. and Oleg Gridnev (plaintiffs) on all their claims and in favor of defendant and counterclaimant Mikhail Fiks (defendant) in the amount of \$41,000 against plaintiffs for cybersquatting and Bane Act violations, defendant filed this motion seeking attorneys' fees of \$125,548.42.

Defendant first seeks fees for defending the copyright claim. In the Ninth Circuit, "an award of attorney's fees to a prevailing defendant that furthers the underlying purposes of the Copyright Act is reposed in the sound discretion of district courts." Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1229 (9th Cir.

1 1997) cert. denied, 523 U.S. 1021 (1998), quoting Fantasy,
2 Inc. v. Fogerty, 94 F.3d 553, 555 (9th Cir. 1996). The
3 factors to be considered in awarding attorneys' fees to a
4 prevailing party in a copyright action include "(1) the degree
5 of success obtained; (2) frivolousness; (3) motivation; (4)
6 the objective unreasonableness of the losing party's factual
7 and legal arguments; and (5) the need, in particular
8 circumstances, to advance considerations of compensation and
9 deference." Id. at 1229.

10 The jury found that plaintiffs did not have a valid
11 copyright. Defendant was very successful in this regard and
12 this factor favors the award of fees.

13 I do not find that plaintiffs' action for copyright
14 infringement was frivolous. The jury's verdict turned more on
15 plaintiffs' failure to present competent evidence than it did
16 on any finding that the claim was baseless, meritless, or
17 instituted for a vexatious purpose. This factor weighs
18 against awarding fees.

19 I find that plaintiffs had a mixed motive in this case.
20 On the one hand, Gridnev testified that he filed this action
21 because he felt that defendant had wrongfully copied his sales
22 pitch and website. On the other hand, Gridnev repeatedly
23 threatened defendant over the phone, which indicates that
24 plaintiffs' motivation was to harass. I find that this factor
25 does not favor either party.

26 This copyright claim was not objectively unreasonable.
27 At trial, Gridnev testified that he had copyrighted his sales
28 pitch and that he subsequently saw the same sales pitch word-

1 for-word on defendant's website. Though Gridnev ultimately
2 did not convince the jury that he owned a valid copyright,
3 this speaks more to a failure to introduce evidence than to
4 the claim being objectively unreasonable. This favor weighs
5 against awarding fees.

6 Finally, I do not find that an award is necessary to
7 further deter plaintiffs. There is no evidence that
8 plaintiffs have engaged in similar lawsuits. Plaintiffs lost
9 on all of their claims and now have a judgment against them
10 for violating the Bane Act. That judgment, in addition to an
11 award of attorneys' fees under the Bane Act, will adequately
12 deter plaintiffs and compensate defendant. This factor weighs
13 against an award of fees. In sum, the factors do not weigh in
14 favor of an award under the Copyright Act. In addition, as
15 discussed below, Fiks failed to break out the time he spent in
16 defending the copyright claim.

17 Fiks also seeks fees for succeeding on his Bane Act
18 counterclaims. Under Section 52.1(h) of the California Civil
19 Code, a prevailing party in a Bane Act case may be awarded
20 attorneys' fees, at the discretion of the trial court. Moran
21 v. Oso Valley Greenbelt Ass'n, 117 Cal.App.4th 1029, 1034
22 (2004). I find that defendant is entitled to attorneys' fees
23 for prosecuting his Bane Act claims. The jury found that
24 plaintiffs' actions were sufficiently egregious so as to
25 warrant punitive damages. Plaintiffs in their opposition do
26 not contend that defendant is not entitled to attorneys' fees
27 for the Bane Act claim. Instead, they contend that the fee
28 request is unsubstantiated and unreasonable. This argument

1 has some merit.

2 Under federal and state law, a party seeking fees "bears
3 the burden of establishing entitlement to an award and
4 documenting the appropriate hours expended and hourly rates."

5 Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). A litigant
6 who did not succeed on all claims should produce records
7 sufficient to provide the court with "'a proper basis for
8 determining how much time was spent on particular claims'".

9 Id. at 437, fn. 12. The Court may properly reduce
10 compensation on account of any failure to maintain appropriate
11 time records. Id. at 438, fn. 13; accord, ComputerXpress,
12 Inc. v. Jackson, 93 Cal.App.4th 993, 1020 (2001).

13 Here, the Court's ability to rule on his motion is
14 obstructed by Fiks' failure to allocate the fees he seeks
15 between his defense of the copyright claim; his defense of
16 plaintiffs' other claims for which defendant has no fee claim,
17 or is not asserting one; his prosecution of the Bane Act
18 counterclaim; his prosecution of the cybersquatting
19 counterclaim for which he claims no fees and his prosecution
20 of the defamation counterclaim which he lost.

21 I have exercised my discretion under Hensley and its
22 progeny in the following manner: First I have eliminated all
23 hours claimed before December 11, 2008, the first date that
24 the counterclaims are mentioned in the billing records, on the
25 grounds that that time was devoted to defending the complaint.
26 I have carefully reviewed each of the time entries after
27 December 11, 2008 and discounted all fees requested. For
28 entries where time could be attributed both to defending

1 plaintiffs' claims and prosecuting the counterclaims, I
2 awarded defendant one-third of the requested fees, after
3 deducting one half (or three-sixths) of the claimed time as
4 attributable to defending the complaint, and an additional
5 one-sixth as attributable to prosecuting the cybersquatting
6 claim, for which no fees were sought, and the defamation
7 claim, which Fiks lost. In my judgment, having presided over
8 this case for over a year, and having presided over the trial,
9 little time in addition to what was spent on the Bane Act
10 claim was spent on the prosecution of the defamation claim and
11 less time was spent on the cybersquatting claim than on the
12 Bane Act Claim. Following the same methodology, I awarded
13 Fiks two-thirds of all time which could be attributed only to
14 prosecuting the counterclaims. Where I could not tell from
15 the time records for which claims the work was performed,
16 entries such as drafting discovery, I awarded nothing, since
17 defendant has the burden of producing adequate records. In
18 addition, I chose not to award any fees for time spent in
19 preparing defendant's motion to compel filed April 21, 2009,
20 since it was filed in violation of my prior Scheduling Order.
21 See Docket No. 72.

22 A reasonable fee is "the number of hours reasonably
23 expended on the litigation multiplied by a reasonable hourly
24 rate." Hensley, 461 U.S. at 432; Serrano v. Priest, 20 Cal.3d
25 25, 48 (1977). The reasonableness of an hourly rate is
26 determined by examining the rates "prevailing in the community
27 for similar work." See Margolin v. Regional Planning Com.,
28 134 Cal.App.3d 999, 1004-05 (1982). Inexplicably, defendant

has not presented any evidence of prevailing rates in the community. However, "when the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value." See In re Marriage of Cueva, 86 Cal.App.3d 290, 300 (1978). Based on my experience with fees in this district, including fees I have awarded, and my experience in presiding over this case, I find that the already discounted rates claimed by Fiks are reasonable.

The balance of plaintiffs' opposition argues that various portions of the claimed fees are not recoverable. Defendant may not recover for clerical and secretarial work that "should be covered in hourly rates as normal overhead." Keith v. Volpe, 644 F.Supp. 1312, 1316 (C.D.Cal. 1986). However, "reasonable attorneys' fees may include paralegal services." Leuzinger v. County of Lake, 2009 WL 839056, *8 (N.D.Cal. 2009). To the extent it appears from the billing records that timekeepers Sumeena Birdi, Adam Schneider and Julie Lockwood performed what I would consider secretarial work, such as routing and mailing documents, I eliminated such hours. However, some of Birdi and Lockwood's time, such as drafting and editing documents and conducting online research in support of the counterclaim, is recoverable as paralegal work.

Using this methodology I award defendant fees as follows:

Karl Kronenberger	\$ 5,236.00
Jeff Rosenfeld	\$ 13,435.00
Margarita Calpotura	\$ 7,890.00
Sumeena Birdi	\$ 929.00

Julie Lockwood \$ 2,239.00

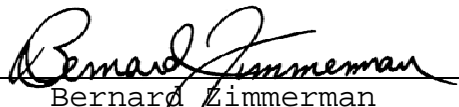
TOTAL: \$ 29,729.00

From this total, I deducted \$1,882.92 in fees I had awarded defendants as a sanction in my Final Pretrial Order, and which was also claimed as part of this motion.

I also award defendant one-third of the claimed computer-based legal research charges incurred after December 11, 2008, for a total of \$886.00. See Trustees of Const. Industry and Laborers Health and Welfare Trust v. Redland Ins. Co., 460 F.3d 1253, 1258-59 (9th Cir. 2006) (noting the "growing circuit consensus" that computer-based legal research fees may be recovered as attorneys' fees).

I find no need for argument and **VACATE** the hearing scheduled for **January 6, 2010**. For the foregoing reasons, **IT IS HEREBY ORDERED** that defendant's Motion for Attorneys Fees is **GRANTED IN PART** in the amount of \$28,732.08.

Dated: January 4, 2010


Bernard Zimmerman
United States Magistrate Judge

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